

² At the conclusion of the August 24, 2006, preliminary hearing, respondent's counsel advised the court that in order to keep the case moving, he had no objection to scheduling the IME before taking the depositions of the additional witnesses and before obtaining a ruling from the court on the notice defense. (P.H. Trans. at 41).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant began working for respondent in January 2006 as a face assembler. The job required him to lift cabinet faces and boxes of screws. The cabinet faces weighed from 1 to 35 pounds, and boxes of screws weighed from 50 to 70 pounds. Claimant asserts that on May 3, 2006, he injured his back after helping a coworker lift a cart over some tracks and then picking up a box of screws. That coworker was Nancy Cochran. According to claimant, Ms. Cochran witnessed the problem claimant was having with his back after lifting the box of screws and suggested he report it to their foreman.³ Claimant states he then told his foreman, Dana Herb, about his accident, and her only response was "okay."⁴ She did not direct him to a health care provider, and he did not request that he be sent to a doctor because he needed to make his quota for the day. Claimant later obtained treatment from his family doctor, Dr. Mike McClintick. Claimant told Ms. Herb that he had seen a doctor for his back, and she told him that she would let his supervisor, Clint Bischoff, know. Claimant also told Ms. Herb about his follow-up visit with Dr. McClintick's physician's assistant. He states he received the same response from Ms. Herb--that she would let Mr. Bischoff know.

Claimant testified that after his accident, he told Ms. Herb once a week for at least three weeks that someone needed to fill out an accident report. He did not talk to Mr. Bischoff about his injury. On June 27, 2006, he reported his accident to Brenda Mock, a workers compensation and safety specialist at respondent, who completed an accident report.

At the conclusion of the August 24, 2006, preliminary hearing, Judge Klein granted respondent until September 6, 2006, to obtain depositions of its witnesses. The depositions of Dana Herb, Clint Bischoff, Denise Huebert, and Brenda Mock were taken by respondent on September 7, 2006. There is no order extending terminal dates in the file, but neither is there an objection to the depositions. Claimant's counsel was present at the depositions and did not object to their being taken out of time. Claimant did object to Ms. Mock being present at the deposition of Ms. Herb and requested that all witnesses

³ A statement written by Nancy Cochran was marked as Claimant's Exhibit 2 at the August 24, 2006, preliminary hearing and offered into evidence. Respondent objected to its admission based on it being hearsay. The ALJ ruled that Claimant's Exhibit 2 was not admissible, and it is not attached to the transcript of that hearing. Neither party deposed Ms. Cochran during the time after the preliminary hearing that the record was kept open.

⁴ P.H. Trans. (Aug. 24, 2006) at 8.

be sequestered.⁵ That request was not ruled upon, and Ms. Mock was present during Ms. Herb's testimony. It is clear from Judge Klein's October 13, 2006, Order that he did consider those depositions. Accordingly, this Board Member has as well.

Ms. Herb testified that she was claimant's foreman. She testified that claimant made it known from his first day of work for respondent that he had a preexisting back problem and previously had back surgery. He would complain about his back hurting and would take off work to see a doctor. Claimant would fill out a memo to let her know he was taking time off to see a doctor, but he never told her that it was related to his work activities. She said claimant never directly told her he wanted to talk to Mr. Bischoff about a back injury. But she did recall telling claimant to also let Mr. Bischoff know what was going on with his back problems, not just her.

Ms. Herb said that in late June 2006, claimant came to her and told her he had injured his back at work. This was the first she heard that he was claiming a work-related injury since coming to work for respondent. She told claimant he would need to fill out an accident report and sent him to the human resources department. Ms. Herb said that claimant had not asked her to fill out an accident report before late June and had not asked to be seen by a doctor. Although she acknowledged that claimant had told her previously that he was having problems with his back, she denied that he had mentioned work as the cause of those back problems.

Mr. Bischoff testified that although he knew claimant was seeing doctors for issues with his back, he did not know that claimant was claiming his back condition was related to his work at respondent until after claimant talked to Ms. Herb and was sent to the human resources department. He did not have any conversations with claimant about his back, and claimant never asked to fill out an accident report. Mr. Bischoff said he would walk by claimant's work station several times a day, and claimant could have stopped him at any point and talked about his back problem. But claimant never did.

Ms. Mock also testified that the first time she knew claimant was making a claim for a work-related injury was on June 27, when he came to the human relations department to complete an accident report. She said that she had seen claimant a week earlier when his wife was injured while working at respondent, but he did not mention anything about a work injury that he had received.

Denise Huebert, the manager of the human resources department at respondent, testified that on June 19, 2006, she met with employees about a new attendance policy. After the meeting, claimant talked with her about doctor appointments he had for a preexisting back injury and asked how the new attendance policy would affect these

⁵ Herb Depo. at 4.

appointments. He did not say these doctor appointments were related to his work activities or an injury at respondent.

The June 6, 2006, chart entry from Bluestem Medical Clinic, P.A., signed by H. Stormont, ARNP, shows claimant's chief complaint to be "back pain" with numbness radiating into the left lower extremity which started a "couple months [ago] gradually getting worse."⁶ She notes that claimant had low back surgery in 2000 by Dr. Eyster which involved a fusion of L3, L4 and L5. An MRI was scheduled and an orthopedic consult with Dr. Estivo was recommended. An MRI of claimant's lumbar spine was performed on June 12, 2006, which was interpreted as normal except "[a]t L5-S1 there is a left paramedian disc extrusion which results in effacement of the ventral thecal sac and encroachment upon the left neural foramina and exiting nerve root."⁷

The June 13, 2006, office chart of H. Stormont, ARNP, contains a history of degenerative disc disease "worse in last [couple] months."⁸ At that time, claimant had complaints of moderate to severe low back pain radiating into both lower extremities. He was referred to a neurosurgeon, Dr. John Dickerson.

The first mention in the medical record of workers compensation of a work-related accident is on June 29, 2006. That record of Dr. M. Katherine Gooch reads: "picking up box and pulled something in back 5-31-06."⁹ It then goes on:

The patient presents as a work comp patient who injured his back at work reportedly on May 31st. He since has been complaining to co-workers but not to the people that matter apparently for the last month. He is just now getting in here to be seen. He does take Zoloft on a regular basis. He has been in Colorado for 5 years, he states, without any problems. He did have back surgery previously per Dr. Eyster in Wichita for a bulging disk with microdiscectomy. He states he really had not had any problems even lifting 50- to 60-pound boxes of fish while he was in Colorado. The surgical scar is evident. He is jumping with any palpation of his back. He cannot it [*sic*] get it precipitated and it is a very uncomfortable sitting. Straight leg raise is negative. He states he has got numbness down to his left great toe and into the left testicle. He does have some muscle spasms.¹⁰

⁶ P.H. Trans., Cl. Ex. 1 at 3.

⁷ *Id.* at 2.

⁸ *Id.* at 1.

⁹ *Id.* at 5.

¹⁰ *Id.*

Apparently Dr. Gooch was not aware of the MRI performed at the Susan B. Allen Memorial Hospital on June 12, 2006, because her chart goes on to recommend that an MRI be obtained.

Will discuss the case with his employer and see if they can get an MRI approved. With his previous surgery it is difficulty [*sic*] to say what is new and what is old without having an x-ray. I did go ahead and put him on Flexeril 10 to 20 mg p.o. t.i.d. and Lortab 5 one p.o. q.4h. p.r.n. not to be taken at work. I did give him a 10 to 20 pound weightlifting restriction and a 20-pound carrying restriction up to 16 times an hour with minimal sitting at work as he states standing makes him feel better. We will follow up with him in the near future and hopefully we will get an approval for the MRI next week so we can get this scheduled.¹¹

Dr. Gooch gave claimant restrictions including no sitting and standing/walking four hours per shift.¹² Claimant believed this meant he was restricted from working over four hours a day. On June 30, 2006, Dr. Gooch clarified that claimant had work restrictions of: "Sitting as little as possible, continuous standing and walking 4 hours/shift, intermittent standing/walking/leaning unlimited. He can work an 8 [hour] day."¹³

Claimant saw Dr. Dickerson on July 10, 2006. He recommended claimant have surgery consisting of a L5-S1 laminectomy and fusion with instrumentation, which was scheduled to be performed on August 21, 2006. He also gave claimant work restrictions which were to be observed until the surgery. It does not appear that this surgery was ever performed. Nevertheless, claimant has not worked since July 10, 2006.

The record also contains a letter from claimant's prior employer dated March 9, 2005, which reads in part that claimant "has been employed with us for the past three (3) years as an over the road delivery driver averaging approximately 2,500 miles per week. He has never called in sick and has never been late."¹⁴ Claimant denies having had problems with his back in the months before May 3, 2006.

This Board Member finds that claimant has failed to prove that he gave timely notice of his alleged May 3, 2006, accident. The medical records fail to support his claim of a specific accident on that date. Ms. Herb not only denies being advised of a work-related injury but states claimant was being accommodated because of his preexisting back condition and was told not to lift the heavy boxes of screws. The coworker that allegedly

¹¹ *Id.*

¹² *Id.* at 6.

¹³ *Id.* at 7.

¹⁴ *Id.*, Cl. Ex. 3.

witnessed claimant's accident did not testify. Claimant alleges a specific accident with an immediate onset of pain. There is no claim of just cause to extend the time for reporting his accident, nor is there any allegation that claimant was either unaware of his injury or that he thought it was a temporary aggravation and would go away. Claimant had a prior workers compensation claim and does not allege he was unaware of his duty to promptly report all work-related accidents. To the contrary, claimant argues he reported his accident to his foreman, Ms. Herb, on the same day it occurred. Ms. Herb denies this and says that if claimant had reported an accident to her, she would have referred him to Human Resources and prepared an accident report. The fact that this is what occurred when claimant reported his back injury was work related in late June 2006 supports Ms. Herb's testimony in this regard. After claimant reported an accident in June, an accident report was completed and he was sent to a doctor by respondent. There is no indication that claimant asked respondent to provide him with medical treatment before June 27, 2006, and the medical records of the physicians and nurse practitioner that claimant saw between May 3 and June 27, 2006, do not contain any mention of a specific accident or of his back injury being work related. And, finally, the context in which claimant complained of back symptoms to his supervisor and of taking off work for appointments with his personal physician would not necessarily alert respondent to there having been a new work related injury or aggravation. To the contrary, these requests and complaints were presented as personal and related to his preexisting condition. Based on the record as it currently exists, claimant has failed to prove that he gave respondent notice of accident within ten days of May 3, 2006.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁵ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁶

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated October 13, 2006, is reversed.

IT IS SO ORDERED.

¹⁵ K.S.A. 44-534a.

¹⁶ K.S.A. 44-555c(k).

Dated this _____ day of January, 2007.

BOARD MEMBER

c: Randall J. Price, Attorney for Claimant
 Brian R. Collignon, Attorney for Respondent and its Insurance Carrier
 Thomas Klein, Administrative Law Judge